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11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
13

14 UNITED STATES OF AMERICA,) No. CV 10-2482-CAS
) CR 04-1239(A)-CAS
15 Plaintiff,)
16 v.) <u>GOVERNMENT'S OPPOSITION TO</u>
) <u>MOTION OF DEFENDANT VICTOR</u>
17 VICTOR GOMEZ-ORTIZ,) <u>GOMEZ-ORTIZ TO CORRECT SENTENCE</u>
) <u>PURSUANT TO 28 U.S.C. § 2255;</u>
18 Defendant.) <u>MEMORANDUM OF POINTS AND</u>
) <u>AUTHORITIES; DECLARATION OF</u>
19) <u>TERRENCE P. MANN</u>
)

20
21 Plaintiff United States of America, by and through its counsel
22 of record, the United States Attorney for the Central District of
23 California, hereby submits its opposition to the Motion to Correct
24 Sentence pursuant to 28 U.S.C. § 2255 ("Motion") filed by defendant
25 VICTOR GOMEZ-ORTIZ on April 6, 2010.

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1 This opposition is based on the attached memorandum of points
2 and authorities, the attached Declaration of Terrence P. Mann, and
3 the files and records of this case.

4 DATED: June 4, 2010

Respectfully submitted,

5 ANDRÉ BIROTTE JR.
6 United States Attorney

7 CHRISTINE C. EWELL
8 Assistant United States Attorney
9 Chief, Criminal Division

/S/

10 TERRENCE P. MANN
11 Assistant United States Attorney

12 Attorneys for Plaintiff
13 UNITED STATES OF AMERICA

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 INTRODUCTION

4 On January 10, 2007, defendant VICTOR GOMEZ-ORTIZ
5 ("defendant") was sentenced by this Court to a 70-month term of
6 imprisonment, based on his conviction for conspiracy to distribute
7 cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and
8 841(b)(1)(A), as charged in Count One of the First Superseding
9 Indictment. (Declaration of Terrence P. Mann ("Mann Decl.") ¶ 2,
10 Exhibit A at 4). The Court's Judgment and Commitment Order also
11 prescribed that "[t]his sentence shall run concurrent to the
12 sentence Gomez is currently serving for Los Angeles County
13 Superior Court case no. BA267759-03." (CR^{1/} 221). Thereafter,
14 defendant was transferred to a Bureau of Prisons ("BOP") facility
15 in Texas, where he is presently incarcerated. (Mann Decl. ¶ 3,
16 Exhibit B).

17 On April 6, 2010, defendant filed his Motion to Correct
18 Sentence pursuant to 28 U.S.C. § 2255 ("Motion"). (CR 409).
19 Defendant claims that the BOP miscalculated his sentence by
20 purportedly failing to "credit[] his federal sentence with time
21 spent in state and federal custody prior to his federal conviction"
22 -- in other words, the approximately 604 days between when he was
23 sentenced in state court on May 17, 2005 and his January 10, 2007
24 sentencing in this case. (Motion at 3, 10).

25 _____
26 ^{1/} "CR" refers to the clerk's record and is followed by the
27 applicable docket control number from the Court's criminal docket in
28 this case. The docket report is attached hereto as Exhibit "A."
Also, "RT" refers to the reporter's transcript of proceedings and is
followed by the applicable date and page references.

1 Defendant's claim must fail, however, because this Court does
2 not have jurisdiction to consider the Motion. Petitions properly
3 filed under 28 U.S.C. § 2255 ("Section 2255") must be filed within
4 one year of the judgment becoming final, and the Motion -- filed
5 more than three years after defendant was sentenced in this case --
6 would be time-barred. Nevertheless, the Motion challenges the
7 execution of defendant's sentence and therefore properly should
8 have been styled a habeas petition under 28 U.S.C. § 2241 ("Section
9 2241"). As such, the Motion was required to have been filed in the
10 jurisdiction where defendant is presently being confined, the
11 Northern District of Texas. Either way, because no statutory basis
12 exists to justify a modification of defendant's sentence more than
13 three years after the judgment became final, the Motion is fatally
14 flawed and must be denied on procedural grounds.

15 Moreover, defendant's substantive claim in the Motion is
16 erroneous. Concurrent sentences are simply sentences that overlap
17 going forward -- i.e., the first custodial sentence does not have
18 to end before the second sentence begins, as consecutive sentences
19 would normally operate. "Concurrent" definitely does not mean that
20 defendant's second, federal sentence should be backdated to begin
21 at the same time as the first, state sentence. In fact, receiving
22 credit for such prior time served is specifically prohibited by
23 statute. Accordingly, the BOP correctly calculated defendant's
24 sentence to end 70 months (minus good conduct time and prior
25 custody credits) after the second, federal sentence was imposed on
26 January 10, 2007, as the Court intended. Because the BOP has
27 correctly calculated the sentence, defendant's claim has no merit
28 and the Motion should be denied on substantive grounds, as well.

II

ARGUMENTA. THE COURT LACKS JURISDICTION TO REACH THE MERITS OF THE MOTION1. If Construed as Falling under Section 2255, the Motion Is Time-Barred

The Motion should have been filed as a habeas petition under Section 2241, as discussed below. Even if the Court were to construe the Motion as it is presently styled as a Section 2255 motion, however, defendant's claims are untimely. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), § 105, 110 Stat. 1214, 1220 (1996), Section 2255 motions must be filed within one year from the latest of:

- a. the date on which the judgment of conviction became final;
- b. the date on which the impediment to making a motion created by the governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- c. the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- d. the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

AEDPA, § 105, 110 Stat. 1214, 1220 (1996).

1 Considering the various alternatives for determining the date
2 from which the AEDPA's one-year statute of limitations runs, it is
3 clear that the Motion is untimely. First, the Petition was filed
4 on April 6, 2010 (Mann Decl., Exhibit A at 5), more than three
5 years after Petitioner's conviction became final on or about
6 January 20, 2007. Indeed, a defendant's conviction becomes final,
7 when he does not seek an appeal (as occurred here), at the time to
8 file the notice of appeal expires -- that is, 10 days after the
9 entry of judgment. See Fed. R. App. P. 4(b); United States v.
10 Schwartz, 274 F.3d 1220, 1223 (9th Cir. 2000). Second, defendant
11 does not claim, nor could he, that the government prevented him
12 from filing the Motion earlier. Third, the Motion asserts no newly
13 recognized right retroactive to cases on collateral review.
14 Fourth, and finally, defendant fails to claim, and cannot claim,
15 that the facts upon which he relies were only discovered within a
16 year of the filing of the Motion, or that they could not have been
17 discovered earlier. Accordingly, if the Motion is treated as a
18 Section 2255 motion, defendant's claims are time-barred.

19 **2. If Construed as Falling under Section 2241, the Motion**
20 **Has Been Filed in the Wrong District**

21 When properly treated as a Section 2241 habeas petition, the
22 Motion remains procedurally defective because it should have been
23 filed in the Northern District of Texas, where defendant is
24 presently confined.

25 As a threshold matter, the Motion should have been filed under
26 Section 2241 because it does not challenge defendant's actual
27 sentence, but rather how the sentence is being executed. "A
28 petition under section 2255 can test only the propriety of the

1 sentence imposed, not the manner of execution." United States v.
2 Giddings, 740 F.2d 770, 771 (9th Cir. 1984); Brown v. United
3 States, 610 F.2d 672, 677 (9th Cir. 1980) ("A petition under § 2255
4 can test only the sentence imposed and not the sentence 'as it is
5 being executed.'" (quoting Ridenour v. United States, 446 F.2d 57
6 (9th Cir. 1971)). There can be no dispute that defendant's
7 challenge to how the BOP is crediting custody time prior to his
8 sentencing hearing is a challenge to the execution of his sentence,
9 which must be addressed by a Section 2241 motion. See Giddings,
10 740 F.2d at 771 (holding that petitioner's claim that he was
11 entitled "to credit against his sentence for time spent in custody
12 prior to sentencing" may be reviewed through a writ of habeas
13 corpus under Section 2241). Defendant's reliance on caselaw
14 addressing Section 2255 (Motion at 4), therefore, is misplaced.

15 Once properly viewed under Section 2241, the Motion must be
16 denied because it has been brought before the wrong district court.
17 In Rumsfeld v. Padilla, 542 U.S. 426, 442 (2004) (internal
18 quotations omitted), the Supreme Court reiterated "the traditional
19 rule [which] has always been that the Great Writ is issuable only
20 in the district of confinement." This traditional rule, of course,
21 has been consistently followed by the Ninth Circuit. See, e.g.,
22 Giddings, 740 F.2d at 771 ("Any habeas petition in this case must
23 be addressed to the district court in the district where appellant
24 is confined."); Brown, 610 F.2d at 677 ("A petition under § 2241
25 must be addressed to the district court which has jurisdiction over
26 [a defendant] or his custodian.") (quoting Braden v. 30th Judicial
27 Circuit Court of Kentucky, 410 U.S. 484 (1973)). Here, defendant
28 is not confined in the Central District of California, but rather

1 is housed at the BOP Dalby Correctional Institution in Post, Texas
 2 -- in the Northern District of Texas. (Mann Decl. ¶ 3, Exhibit B).
 3 Thus, the Motion should be denied because only the district court
 4 for the Northern District of Texas has jurisdiction to hear it.

5 **3. No Statutory Basis Exists for Modifying Defendant's**
 6 **Sentence More Than Three Years after It Was Imposed**

7 Separate and apart from the procedural defects specific to
 8 Sections 2255 and 2241, this Court additionally lacks jurisdiction
 9 to modify its judgment to reduce the sentence it imposed on
 10 defendant in January 2007.

11 "A court generally may not correct or modify a prison sentence
 12 once it has been imposed." United States v. Penna, 319 F.3d 509,
 13 511 (9th Cir. 2003) (citing 18 U.S.C. § 3582(c)). Except for
 14 specific circumstances not present here, the court may modify a
 15 sentence only "to the extent otherwise expressly permitted by
 16 statute or Rule 35 of the Federal Rules of Criminal Procedure." 18
 17 U.S.C. §3582(c)(1)(B). In particular, Federal Rule of Criminal
 18 Procedure 35(a) provides:

19 Within 7 days after sentencing, the court may
 20 correct a sentence that resulted from arithmetical,
 technical, or other clear error.

21 Rule 35's seven-day limit is a jurisdictional requirement, and once
 22 that time has passed, the district court loses jurisdiction to
 23 modify a sentence. See Penna, 319 F.3d at 510, 512. Because the
 24 seven-day time period has long since passed in this case, the Court
 25 lacks jurisdiction under Rule 35 to modify defendant's sentence,
 26 and defendant has failed to identify any other possible statutory
 27 basis for relief. Thus, defendant is barred from seeking a
 28 modification of his sentence under U.S.S.G. § 5G1.3, and the

1 authorities upon which he relies for application of this Guidelines
2 section (Motion at 5-8) are all inapposite in this case.

3 The Motion therefore should be dismissed on procedural grounds
4 because the Court does not have jurisdiction to hear it.

5 **B. THE MOTION IS WITHOUT SUBSTANTIVE MERIT IN ANY EVENT**

6 Yet even if the Court were to ignore the Motion's clear
7 procedural flaws and address its merits, defendant cannot succeed
8 as a matter of law. Defendant takes issue with the BOP's decision
9 not to give him credit for time he served in state custody prior to
10 the imposition in his federal sentence, and he asks this Court to
11 order the BOP to reduce his sentence accordingly. Specifically,
12 defendant argues that his sentence should be reduced by the
13 approximately 604 days between the date he was sentenced in state
14 court, May 17, 2005, and his sentencing hearing in this case,
15 January 10, 2007. (Motion at 10-13). This argument fails.

16 Irrespective of the merits of defendant's argument, the Court
17 may not intervene in the process of determining the credit for
18 prior custody to which defendant may (or may not) be entitled. It
19 is well-established that it is within the sole discretion of the
20 Attorney General, through the BOP, to make this determination, not
21 the district courts. See United States v. Wilson, 503 U.S. 329,
22 334-35 (1992) (holding that "once a district court sentences a
23 federal offender, the Attorney General, through the BOP, has the
24 responsibility for administering the sentence"); United States v.
25 Lualemaga, 280 F.3d 1260, 1265 (9th Cir. 2002) ("The initial
26 calculation [of credit for time served] must be made by the
27 Attorney General acting through the Bureau of Prisons.").

28 Moreover, there is a statutory bar to defendants receiving

1 pre-sentence credit for time spent in custody that has been awarded
2 against any other sentence. Specifically, 18 U.S.C. § 3585(b) --
3 entitled "Credit for prior custody" -- provides that:

4 A defendant shall be given credit toward the service
5 of a term of imprisonment for any time he has spent
6 in official detention prior to the date the sentence
commences -

7 (1) as a result of the offense for which the
sentence was imposed; or

8 (2) as a result of any other charge for which
9 the defendant was arrested after the commission of
the offense for which the sentence was imposed;

10 that has not been credited against another sentence.

11 18 U.S.C. § 3585(b) (emphasis added); see also Wilson, 503 U.S. at
12 337 ("Congress made clear that a defendant could not receive a
13 double credit for . . . detention time."). In the instant matter,
14 as defendant points out in the Motion, the BOP calculated
15 defendant's sentence by starting his 70-month sentence on the date
16 of his sentencing hearing before this Court, and then reducing it
17 for good conduct time and prior custody (Willis) credits to reach
18 the present release date of May 20, 2011. (Motion at 10-12).
19 Section 3585(b) precluded defendant from receiving credit for
20 custody time prior to his sentencing in this case, however, because
21 he was still receiving credit against his state sentence even after
22 being transferred to federal custody. See Taylor v. Reno, 164 F.3d
23 440, 441 n.1, 445 (9th Cir. 1998) (holding that the state retains
24 primary jurisdiction over a transferred prisoner, and federal
25 custody commences only when the state authorities relinquish their
26 custody upon the satisfaction of the state term). Defendant's
27 federal sentence therefore could only be concurrent with the
28 remaining, unserved portion of his state sentence. Thus, the BOP

1 correctly calculated defendant's sentence, as required by statute.

2 Finally, the BOP's calculations are consistent with the
3 Court's instructions at defendant's sentencing hearing. After the
4 Court explained its intention to sentence defendant to a 70-month
5 term of imprisonment concurrent with his state sentence, defense
6 counsel initiated the following discussion:

7 MR. WINDSOR: ... I think the intent of the Court and
8 probation is, that he receive an, effectively, a
9 reduction of 18 months in federal sentence, and why
don't we just do the sure way and accomplish it that
way.

10 THE COURT: I don't think it's my intention to see
11 that he receives a reduction of 18 months off of 70
12 months. I mean, we have a plea agreement. We have,
13 as they say, a finding of safety valve eligibility
14 and the circumstances that I just think work very
much in favor of your client, and I do think that
this was the intention of the government in asking
for the 70 months, and I don't think it's
unreasonable in this circumstance. I really don't.

15 (RT 1/10/07: 14) (emphasis added). The Court had every opportunity
16 to reduce defendant's sentence under U.S.S.G. § 5G1.3 but declined
17 to do so. In fact, the Court made clear that it intended for
18 defendant to serve a custodial sentence of 70 months; in other
19 words, a 70-month sentence that was concurrent -- or overlapped
20 prospectively -- with defendant's state court sentence. The Court
21 respected the BOP's exclusive authority to make time-served
22 determinations, and should do so again in rejecting defendant's
23 latest attempt to obtain the approximately 18-month reduction of
24 his sentence. There is no basis for this requested relief in the
25 law and, thus, the Motion should be denied.

26 **III**

27 **CONCLUSION**

28 For the foregoing reasons, the Motion should be denied.

DECLARATION OF TERRENCE P. MANN

I, Terrence P. Mann, declare as follows:

1. I am an Assistant United States Attorney in the United States Attorney's Office for the Central District of California (the "Office"). I have been assigned to prepare the government's response to the Motion to Correct Sentence pursuant to 28 U.S.C. § 2255 ("Motion") filed by defendant VICTOR GOMEZ-ORTIZ ("defendant"). I have personal knowledge of the following facts, and if called and sworn as a witness, I could competently testify thereto.

2. Attached hereto as Exhibit "A" is a true and correct copy of the docket from defendant's underlying criminal case.

3. Attached hereto as Exhibit "B" are true and correct copies of documents that I downloaded from the Bureau of Prisons ("BOP") website demonstrating that defendant is presently confined at the Dalby Correctional Institution in Post, Texas. On or about May 27, 2010, I spoke with BOP Supervisory Attorney Eli Ben-Shmuel, who confirmed defendant's placement at a BOP facility in Texas.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct. Executed this 4th day of June, 2010, in Los Angeles, California.

/S/

TERRENCE P. MANN
Assistant United States Attorney